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Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSUL, LTD.

Petitioner,

v.

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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40 pp

QUESTIONS PRESENTED

1. Whether it is an illegal attempt to monopolize under Section 2 of the Sherman Act for a company with control over transportation of natural gas to foreclose potential entrants into markets for the purchase and sales of natural gas?

2. Whether the Fourth Circuit applied the wrong legal standard in holding that two natural gas fields from which plaintiff sought to meet emergency needs of both gas distribution companies and industrial end users were not relevant markets susceptible to monopolization in violation of Section 2 of the Sherman Act?

LIST OF PARTIES

Petitioner: Consul Ltd., a consulting firm of which the principals are Kenneth B. Wilson and Tenney I. Deane, Jr.

Respondents: Transco Energy Company, formerly known as Transco Companies, Inc., and Transcontinental Gas Pipe Line Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner Consul, Ltd. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 14, 1986, petition for rehearing *en banc* denied December 30, 1986.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1986. A timely petition for rehearing *en banc* was denied on December 30, 1986, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code Title 15 §2
Sherman Antitrust Act

> §2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act 15 U.S.C. §12-27

(Section 4 of the Clayton Act)

> §4 That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall re-

cover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This is a civil antitrust case under Section 4 of the Clayton Act to recover damages and for injunctive relief under Section 2 of the Sherman Act. Both attempted and actual monopolization are charged under Section 2 by reason of the defendant Transco's refusal to transport gas for a fee during a period of shortage when there was ample capacity in its pipeline. The claim for injunctive relief relates to an ongoing policy of Transco not to transport for a fee when such transportation would conflict with Transco policy.

The plaintiff is a diversified consulting firm, the two principals of which on energy matters are Kenneth B. Wilson and Tenney I. Deane, Jr. (J.R. pp. 1526-29) The defendant corporations are Transco Energy Company, a Delaware holding company with its national offices at Houston, Texas, and its subsidiary, Transcontinental Gas Pipeline Corp., also a Delaware corporation with its national office in Houston, Texas. (J.R. pp. 13, 11Aff) Defendants are herein collectively referred to as Transco. Transco owns and operates an interstate natural gas pipeline that extends from the Gulf of Mexico to the State of New York. (J.R. pp. 14, 11Aff) It is the only means of transporting natural gas into the state of North Carolina. (J.R. pp. 1423-25)

Transco's pipeline is in some areas like North Carolina the only available pipeline that serves its cus-

tomers. Major metropolitan areas are generally served by two or more pipelines, so that the degree of monopoly power varies from one geographic area to another. (J.R. pp. 1394; 1425) At the supply end, Transco's proximity to natural gas fields varies. Since the price of gas was regulated until 1978, competing pipelines could not offer differing prices so that economics normally dictated that a source of gas would be sold to the nearest pipeline. (J.R. pp. 1421-22)

The events giving rise to plaintiff's damage claim occurred in 1978. As a result of a nationwide shortage that developed early in the 1970's and continued into 1979, numerous pipeline systems, including Transco's, were in curtailment. (J.R. pp. 1143-46; 1406) Federal regulatory changes of two kinds had been made in response to the shortage conditions. One was a set of end user allocations that gave highest priority to residential heating, hospitals, and other essential services, and lowest priority to industrial users. (J.R. pp. 1143; 1405A) This low priority for industrial users impacted with particular severity in areas like North Carolina where industrial users could not turn to alternative fuels, as many could in states to the North. (J.R. p. 1429)

The second regulatory change was to permit certain categories of emergency sales outside the price regulated system then in force. These sales were designed to attract into the interstate system sources of gas that were being held for intrastate use to avoid the federal regulatory system. Under that system, any sale from a natural gas field in interstate commerce permanently dedicated that field to the price regulated interstate system for its life. (J.R. pp. 1406-1409)

The emergency regulations permitted sales of several types that, although subject to regulatory approval as to price and other matters, were exempt from the regulated price itself, and did not dedicate the source of the gas to the regulated system. The two types of sales principally involved in this case were for periods of 60 days and 2 years respectively. The two year sales, known for the regulatory provision authorizing them as 533s, permitted direct purchase by end users from an intrastate pipeline. They required prior approval by the regulatory authorities (initially the Federal Power Commission (FPC) and its successor, the Federal Energy Regulatory Commission (FERC)). Sixty-day sales, ("2.68 sales") in contrast were made not to end users but to local gas distribution companies and did not require prior regulatory approval. After-the-fact reporting was required. The regulations also permitted "rolling over" 60-day contracts if more than one utility company was purchasing from the same intrastate source (J.R. pp. 1405-1405A; 1149-51; 1430-31)

The regulations specifically targeted the two year sales at industrial end users who were impacted by the priority allocations. The regulations thus sought to tap new sources of gas that were being held out of the interstate system by reason of the regulatory system and target that new gas to impacted industrial users. (J.R. pp. 1151-52; 1405A)

Both end users and local gas distribution companies were without experience in dealing directly with natural gas producers, having always obtained adequate supplies from the pipelines. (J.R. pp. 1154-55; 1537) Transco arranged some emergency sales, but did not provide adequate service of that kind for Consul's

clients. (J.R. 1428-29) The plaintiff's principals, Wilson and Deane, had extensive knowledge of the oil and gas industry, both from private business and government regulatory service. (J.R. pp. 1139-41; 1528-37) They, and other firms like them, served to find sources of gas for end users and local distribution companies. Consul worked on a retainer basis for its end user clients, with an added success fee if it actually obtained gas. Consul's fees were reported to the FERC and were the same as others charged for the same service. (J.R. pp. 1158-59) Consul had, by April 1978, signed at least 10 industrial end users, including ALCOA and Allied Chemical, (J.R. pp. 1542-3) seeking emergency gas in a total amount of 15,000 dekatherms a day, (J.R. pp. 1174-75) which at the contract price approved by FERC (J.R. p. 968) would have amounted to approximately $19.7 million dollars over the two year period, on which plaintiff would have earned fees of approximately $1.9 million. (J.R. p. 1601)

Plaintiff located a large new natural gas field in Greens Creek, Mississippi that had been discovered in 1977 and which was not yet producing. (J.R. pp. 1175-77; 1556) It was the only field large enough to meet the needs of all the plaintiff's clients. (J.R. 1175-77) It was not producing because its owners were not willing to sell in the regulated market and Transco had refused to make a two year emergency sale as the owners had requested. (J.R. pp. 1296-97; 1362-63) Transco instead applied for a different form of two year sale, for which it could not meet the regulatory requirements and was turned down by the FERC shortly before the plaintiff came into the picture. (J.R. pp. 1296-97; 1502-6) A connection from

the field to Transco's pipeline already existed, having been used for one 60 day sale and then discontinued. (J.R. p. 1514)

Plaintiff proposed a two year emergency sale, with interim 60 day sales that could be started immediately pending regulatory approval of the two year sales (J.R. pp. 1560-61); but the owners were skeptical because of their prior frustration with Transco. (J.R. pp. 1180-81; 1557-63) As a demonstration, plaintiff arranged by phone a 60 day sale from another intrastate source, Holiday Creek, to a local gas distribution company, Public Service of North Carolina. (J.R. 1181-82; 1563) The owners then signed contracts with plaintiff covering the entire 15,000 dekatherms a day needed by Consul's clients for two year 533 sales preceded by a series of 60 day sales. (J.R. pp. 1189-90; 1580-83) Transco, however, refused to transport the gas, notified local gas distribution companies that it would not transport gas under contracts arranged by plaintiff, and cut-off the already flowing 60 day sale from Holiday Creek to Public Service of North Carolina. (J.R. pp. 1194; 1581-82; 1288-89; 2325-29; 2497-98)

Following these refusals, Transco acquiesed in pressure from the owners of Greens Creek and filed an application for approval of the two year contracts with FERC which only it could do. Transco also agreed to transport the first of the 60 day sales under Consul's contract, but usurped all succeeding 60 day sales for itself. (J.R. pp. 1206-1214; 1587-89) There were delays in the regulatory approval process, however, which Consul charges to regulatory obstruction by Transco, that ultimately led to loss of the two year contracts. (J.R. 948-951; 963-965)

This action was brought in the U.S. District Court for the Middle District of North Carolina. Plaintiff charged Transco with violation of Section 2 of the Sherman Act on five counts, three under attempted monopolization and two of actual monopolization, as follows:

(1) Attempted monoply was charged on the basis that

(a) Transco's pipeline is an essential facility for transporting gas to North Carolina, that plaintiff was a competitor of Transco in arranging emergency sales under the federal regulations, and there was ample capacity in Transco's pipeline to make the transportation requested.

(b) An express reason for Transco's refusing to transport was a standing, written corporate policy to decline to transport by contract from a source of natural gas that Transco either at present or sometime in the future might wish to buy for itself, thus leveraging its monopoly power in the market for transportation to exclude competition in the distinct product market for natural gas.

(c) Another express reason for Transco's refusal to transport was to prevent local gas distribution companies from going out on their own to buy gas, and to prevent plaintiff from dealing with Transco's customers, the local gas distribution companies.

(2) Actual monopolization was charged with respect to the two fields from which transportation was refused, because both were included within the scope of Transco's policy described in 1(b) above, which extended to all commercial sources of natural gas in proximity to its pipeline, and because that foreclosure of competition was effective with respect to these two fields.

Prior to trial, the District Court awarded a partial summary judgment in favor of Transco with respect to the two year contracts on grounds of causation. (J.R. p. 1054) Consul appealed the summary judgment on both procedural and substantive grounds, but the Court of Appeals did not reach that issue because its ruling decided the liability issue in favor of Transco.

The case, limited to the 60 day contracts, was tried to a jury. Plaintiff introduced expert and party testimony as to the existence of all the various markets described above: the North Carolina end users that were totally dependent on Transco, the separate markets for transportation of natural gas and for natural gas as a product, the local gas distribution companies as distinct local markets; and the two fields of natural gas, Greens Creek and Holiday Creek, as relevant markets for purposes of actual monopolization. (J.R. pp. 1391-95; 1418-27)

The District Court gave an unchallenged charge on the relevant market. (J.R. pp. 1831-34) He also gave the requested charge on denial of an essential facility but refused to submit a special interrogatory to the jury on that issue on the ground that it would be tantamount to a directed verdict against Transco. (J.R. pp. 1638, 1792) He declined to instruct on le-

veraging on the ground that Transco was already in the business before the plaintiff entered the scene, (J.R. p. 1794) and refused to charge on market foreclosure without explanation. (J.R. p. 1794) He did not, however, instruct the jury to ignore these charges, which were made to the jury during the course of the trial. (J.R. 1113-14)

The jury verdict was expressed through answers to special interrogatories, in which they found that the plaintiff had proved a relevant market or markets and awarded damages pertaining to the refusal to transport from both Greens Creek and Holiday Creek. (J.R. p. 1858) The trial court entered judgement n.o.v. in favor of Transco on two contracts (out of four), one relating to Greens Creek, without explanation, and one as to the Holiday Creek shipment, stating that it was not a relevant market but with no further explanation. (J.R. pp. 1069 D-E)

No hearing was held on the request for injunctive relief. Plaintiff moved for transfer of that portion of the case to the Western District of North Carolina on the ground that another suit for injunctive relief against Transco had just been filed there by a group representing a cross section of North Carolina users of natural gas. That motion was denied. (J.R. pp. 1069 E-F)

Cross appeals were taken on all rulings of the trial court. Plaintiff appealed the judgement n.o.v. as to two 60 day contracts at Greens Creek, one at Holiday Creek, the partial summary judgment and denial of the motion to transfer.

The Fourth Circuit panel overruled the jury's finding that the Greens Creek field was a relevant mar-

ket, and held that the trial court should have entered a judgement n.o.v. against plaintiff on all counts. The panel also rejected the claims of attempted monopoly on the basis of its relevant market ruling, which therefore also bars the claim for injunctive relief based on charges of attempt to monopolize.

REASONS FOR GRANTING THE WRIT

1. Transco has and continues to use the strategic dominance of its power over Transportation to Foreclose Potential New Entrants into Product and Distribution *Markets for Natural Gas*

The shortage period of the 1970s was a watershed in the history of the natural gas industry. (J.R. pp. 1409-1411; 2478-80) Prior to that time only the interstate pipelines bought and sold natural gas from producers in the fields; and no one else sold gas to local gas distribution companies. (J.R. pp. 1391-1395) The shortages, and the emergency federal regulations were but the first of a succession of events that were to change this market structure permanently. (J.R. pp. 1409-1411; 2478-80)

Transco's Chief Executive Officer, W.J. Jack Bowen was deposed during discovery. In that deposition he described vast changes that had occurred and more that he expected to occur in this industry in the future. (J.R. pp. 2478-80). He also indicated a belief that under these changing conditions Transco's role would be changing and that it would be doing more transportation on a contract basis. (J.R. pp. 2499-2503). He was, however, unwilling to give assurance that plaintiff could obtain transportation then or in the future, and that a factor weighing against it would

be any conflicting objective of its own that Transco might have. (J.R. p. 2501).

During the trial, Transco's corporate witness testified that even under a publicly announced program to shift Transco's emphasis from buyer and seller to transporter of gas, the availability of transportation was largely a matter of whether Transco faced competition at a particular location. (J.R. pp. 1370-72).

More recently, the FERC has undertaken in a rule making proceeding to encourage natural gas pipelines to act as transporters and issued Order 436 as a result; but FERC has no authority to require pipelines to transport by contract, so the program is only voluntary.[1]

The problem is in no small part the built-in incentive which Transco has to use the leverage inherent in its control over transportation to further other corporate objectives not related to its public utility function of transporting natural gas for a regulated profit.

Transco Energy Corp., the holding company which controls the various operating subsidiaries, in addition to its regulated pipeline business, is in such unregulated businesses as exploration, coal, and synthetic fuels. (J.R. pp. 2472-73). The plaintiff's expert witness, Tom Hughes, who has extensive experience in the natural gas industry, including several high level regulatory positions, explained at least one incentive Transco has for preferring buying and selling gas rather than to transport it for a fee. Transco's earnings are the same in either case, since Transco is not

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[1] 50 *Fed. Reg.* p. 42, 408 (Oct. 18, 1985), *Regulations Preamble 1982-85* para 30-665.

permitted to charge a markup on gas which it purchases and re-sells. (J.R. p. 1307) It is only entitled to earn a regulated profit for transporting the gas. When Transco purchases and re-sells the gas, however, the entire volume of these wash sales is reported as part of the corporation's revenue. It is the difference, as Mr. Hughes pointed out, between Transco being the $3.5 billion company that it is and being a mere one-half billion dollar company, a fact that is useful to Transco in its other businesses. (J.R. pp. 1412-14)

During the shortage period, which was the subject of tne facts tried below, Transco reacted reflexively to the new influx of competition into what had previously been a natural monopoly. It first refused outright to transport under contracts arranged by plaintiff (J.R. pp. 1196-97; 1288-90); it advised plaintiff's customers that it would not transport gas under contracts arranged by plaintiff (J.R. pp. 2325-29; 2497-98); it expressed a purpose to prevent its gas distribution company customers from going out on their own to find supplies of gas (J.R. pp. 1187; 1340-41); then when producer pressure caused Transco to agree to file the necessary regulatory applications for two year contracts, Transco still held out in its refusal to transport under all but one of Consul's 60 day contracts, (J.R. pp. 1206-1214; 1587-89) and engaged in what Plaintiff contends was regulatory obstruction that resulted in delays fatal to Plaintiff's two year contracts. (J.R. pp. 948-951; 963-965)

The Transco policy under attack in this suit is therefore to use the strategic dominance inherent in its pipeline in just the way that this Court condemned

a transmitter of electric power for doing in *Otter Tail Power Co. v. United States*, 410 U.S. 366, *reh. denied*, 411 U.S. 910 (1973):

> "The District Court determined that Otter Tail has a strategic dominance in the transmission of power in most of its service area and that it used that dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply . . . Use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act. *Lorain Journal v. United States*, 342 U.S. 143, 154, 96 L.Ed. 162, 72 S.Ct. 181; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375, 71 L.Ed. 684, 47 S.Ct. 400." 410 U.S. 366 at 377.

In addition to its strategic advantage, Transco's pipeline constituted an essential facility for all North Carolina users, for whom there was no alternative, at a time of shortage and curtailment when there was ample capacity in the pipeline to transport all of the gas involved in this case. *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912) (Denial of access to a central rail facility); *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc.*. 194 F.2d 484 (CA1), *cert. denied* 344 U.S. 817 (1952) (Denial of access to a central marketing facility); *MCI Communications v. AT&T*, 708 F.2d 1081, 1132, 1141-42, 1153-56, 1198 (CA7 Cir.) *cert. denied*, 464 U.S. 891 (1983) (Denial of access to a telephone system).

Moreover, by denying access by Plaintiff *both* to the sources of supply in the Greens Creek and Holiday

Creek Fields, and to the gas distribution companies and individual end users that were Plaintiff's clients, Transco engaged in illegal market foreclosure in violation of Section 2. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (Denial of access to radio advertising); *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc., supra.*

All of the above authorities were decided as illegal attempts to monopolize, involving specific intent, an element not requried for actual monopolization. *United States v. Griffith*, 334 U.S. 100, 105-6 (1948); *Otter Tail Power Co. v. United States, supra*; *United States v. Aluminum Co. of America*, 148F.2d 416, 431-32 (CA2 1945).

The Court of Appeals erred in seeking to avoid the force of these precedents on the ground that it disagreed with the jury's finding that plaintiff had proved the existence of a relevant market or markets in connection with its separate charges of actual monopolization of the Greens Creek and Holiday Creek fields. The establishment, *vel non*, of those markets, had no relevance to the above charges of attempted monopoly, which have been variously labeled the denial of an essential facility, leveraging, and market foreclosure.

As to all of these charges there was abundant and undisputed proof of the various markets involved, all of which were distinct from the two natural gas producing fields. The facts that there was no alternative means of transporting gas to North Carolina, and that Plaintiff and Transco were competitors in arranging emergency contracts were undisputed. *MCI Commu-*

nications Corp. v. AT&T, 708 F.2d 1081 (CA7) *cert. denied*, 464 U.S. 891 (1983) at 1132-33. There being no alternative, the elements of a relevant market were necessarily proved. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961).

There was likewise no dispute that the markets for transportation of natural gas and the product market for natural gas in proximity to Transco's pipeline are distinct, and that Transco was leveraging its power over transportation to exclude competition in the product market for gas. (J.R. pp. 1419-28; 1301, 1303)

Transco's purpose to foreclose market access by Plaintiff both to the sources of gas in the field and to gas distribution companies, whose pipeline systems constituted distinct markets, and end users who consumed it at the other end was clear from Transco's own admissions. (J.R. pp. 1187; 1340-41)

The Court of Appeals mis-characterized plaintiff's argument with respect to the necessary market proof by identifying it with a disputed Ninth Circuit view that proof of a relevant market is not necessary when the charge is attempted monopoly, citing numerous cases in other circuits that reject the Ninth Circuit's position. (Appendix at V A. p. 9a) The Ninth Circuit view, first stated in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (CA9), *cert. denied*, 377 U.S. 903 (1964) held categorically that proof of a relevant market was not needed when the charge was attempted monopoly. That holding was based squarely on footnote 23 of this Court's decision in *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395-396 (1956)*. That footnote, which is reproduced in the margin[2], can be

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[2] 23. The Government notes that the prohibitions of §2 of the

read as implying that attempted monopoly cases, which require a showing of specific intent, do not

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Sherman Act have often been extended to producers of single products and to businesses of limited scope. But the cases to which the Government refers us were not concerned with the problem that is now before the Court. In *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, a conspiracy to monopolize trade in vegetable parchment was held to be a violation of §2. Parchment paper is obviously no larger a part of commerce than cellophane. Recovery, however, was based on proven allegations of combination and conspiracy to monopolize, and the scope of the market was not in issue. P. 560. Similarly, *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Co.*, 293 U.S. 268, ruled that a combination or conspiracy for the purpose of monopolizing the farm-paper business in the north central part of the Nation would be illegal by reason of the second section of the Sherman Act. *Lorain Journal Co. v. United States*, 342 U.S. 143, a case not cited by the Government, was concerned with even a smaller geographical area (dissemination of news in a community and surrounding territory). But the Court held only that defendant had attempted to monopolize, not that he had in fact monopolized. Also, this Court found in *United States v. Columbia Steel Co.*, 334 U.S. 495, that the "relevant competitive market" for determining whether there had been an unreasonable restraint of trade (or an attempt to monopolize) was the market for "rolled steel" products in an 11-state area. Women's dresses of "original design," *Fashion Originators' Guild v. Federal Trade Comm'n.* 312 U.S. 457; "first run" motion pictures, *United States v. Paramount Pictures*, 334 U.S. 131; the news services of one news agency, *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y.) *aff'd.* 326 U.S. 1; and newspaper advertising as distinguished from other means of news dissemination, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, have all been designated as parts of commerce. All four were concerned only with the question of whether

involve the same elements of market proof as required in *du Pont*. The Ninth Circuit has, in any event, modified its holding, ruling in at least one case that proof of a relevant market was required in connection with a particular charge of attempted monopoly. *M.A.P. Oil Co., Inc. v. Texaco, Inc.*, 691 F.2d 1303 (CA 9 1982)

Plaintiff, however, did not rely on this Ninth Circuit authority, but on the cases cited above and the Fifth Circuit case of *Woods Exploration and Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286 (CA5 1971), *cert. denied*, 404 U.S. 1047 (1972). That case reversed a trial court's entry of judgment n.o.v. which was premised on ruling as a matter of law that a single natural gas producing field could not be a relevant market. The Fifth Circuit is one of the circuits that has expressed disagreement with the Ninth Circuit's view, *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (CA5 1978) *cert. denied*, 440 U.S. 939 (1979). Nevertheless, in the course of its opinion in *Woods*, the Fifth Circuit quoted with approval from a district court case in the 10th Circuit, *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289, 304

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there had been an attempt to monopolize. *United States v. Aluminum Co. of America*, 148 F.2d 416 (CA2d Cir.), did involve the question of monopolization. Judge Hand found that the relevant market for measuring Alcoa's power was the market for "virgin" aluminum; he refused to consider to close competition offered by "secondary" (und) aluminum. The reason for the narrow definition was that Alcoa's control over virgin aluminum permitted it to regulate the supply of used aluminum even though the latter should be actually sold by a competitor. Consequently, the case is not particularly helpful in the problem of market definition now before the Court.

(D. Colo. 1969), involving a relevant market issue in connection with an oil pipeline as follows:

> "Defendent would have us engage in market analysis, considering the full breadth of 'economic and competitive realities,' to determine that the market structure is, if not nationwide, at least as broad as the entire Four Corners region. And there is no doubt whatever that Shell does not possess a monopoly of purchasing in any of these larger areas considered as a whole. However, in our opinion, such analysis is unnecessary in this case and the 'relevant market' is in that sense irrelevant. We have here a practice illegal in itself, operation of the pipelines as private carriers, a purpose and the obvious natural effect of which was to exclude nonlocal competition from the crude supply which Shell badly needed. When one must 'look' for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously an essential first step. But when, with an illegal practice such as is present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears no real need to go further." 306 F.Supp. at 304."

Woods v. Alcoa and *Denver Pipeline* are the only prior cases involving a relevant market issue in the context of a petroleum pipeline. Both of them declined to rule, as the Fourth Circuit did here, that deliberate exclu-

sionary behavior may be excused by manipulating the term "relevant" market. Although the Ninth Circuit's interpretation of footnote 23 of the *duPont* decision in *Lessig* may have been overly categorical, that footnote, and the various criteria applied in *Otter Tail*, *Griffith*, and *Lorain Journal* support the above quoted language from *Woods* and *Denver Pipeline* that the market proof in attempt cases does not involve the same kind of "relevance" required for proof of actual monopolization. The Fourth Circuit's ritualistic insistence on the term "relevant" in a case involving hard core monopolistic behavior and ample proof of actual markets betrays a fundamental confusion that this Court should correct.

2. The Court of Appeals Erred in Ruling as a Matter of Law That Two Natural Gas Fields from which Plaintiff Sought to Meet Emergency Needs of Gas Distribution Companies and End Users were not Relevant Markets Susceptible to Monopolization in Violation of Section 2 of the Sherman Act

The Court of Appeals' relevant market ruling erred on two counts. It (a) improperly overruled a jury finding on a question of fact, and (b) applied an improper test of how to define a relevant market that is both local and regional in scope.

The jury was asked by special interrogatory whether Transco monopolized a relevant market or markets. The jury responded "yes" (J.R. p. 1858), and identified damages related specifically to Greens Creek and Holiday Creek contracts. (J.R. p. 1858).

The Court of Appeals, in overruling the trial court for refusing to enter judgment n.o.v. on two items of damage, and sustaining his entry of judgment n.o.v. on two others, did not find any flaws in the instruc-

tions to the jury, which neither party faulted. The Court of Appeals simply came to a different conclusion on the facts than the jury did, which exceeds the proper scope of appellate review under the constraints of the Seventh Amendment. *A & G Stevedores v. Ellerman Lines*, 369 U.S. 355 (1969); *International Boxing Club v. United States*, 358 U.S. 242 (1959).

The Court of Appeals, in rejecting the jury's finding that Greens Creek was a relevant market, did so on the basis that the relevant market was a national market for natural gas—stated *sua sponte* and without support in the record by either party:

> "There is no reason to believe that circumstances rendered the two fields around which the instant events occurred economically significant portions of the national market for natural gas."(App. p. 14a).

There is no such thing as a national market for natural gas. The record clearly showed that the constraint of pipeline transportation serves to define multiple markets measured by the reach of various pipelines. (J.R. pp. 1421-22) And further:

> There is no indication that Consul's efforts to find sources of gas elsewhere in the country were foreclosed by Transco's power in the market." (App. p. 14a).

This statement is irreconcilable with the undisputed evidence described above that Consul could not get gas anywhere else in the country; and that the only way it could get gas was through Transco.

The Fourth Circuit's ruling is also in conflict with *Woods Exploration and Prod. Co. v. Aluminum Co.*

of America, 438 F.2d 1286 (CA5 1971), *cert. denied*, 404 U.S. 1047 (1972), which held that a single natural gas field can be a relevant market. The Fourth Circuit stands alone in rejecting the idea that a relevant market may also have submarkets:

> "The use of the term 'submarket' is to be avoided; it adds only confusion to an already imprecise and complex endeavor. For antitrust purposes a product group or geographic area either meets the listed criteria, in which case it is a relevant market; or it does not, in which case it is irrelevant for purposes of analysis. No fiddling with nomenclature will change the analysis or result." *Satellite Television v. Continental Cablevision*, 714 F.2d 351, 355 n.5 (CA4 1983), *cert. denied*, 465 U.S. 1027 (1984)

This statement is in direct conflict with rulings of this Court and other circuits that local markets may be relevant markets so as not to excuse restraints exercised in them because larger regional or national markets also exist. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("However, within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (CA DC 1977), *cert. denied*, 436 U.S. 956 (1978) (RFK stadium held to be a relevant market despite nationwide character of the National Football League). This Court emphasized in both *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 173 (1948) and *International Boxing Club, supra*, that: "§2 condemns monopoly of 'any part' of trade or commerce" 358 U.S. at 252.

CONCLUSION

The Fourth Circuit's opinion effectively nullifies three lines of precedent of this Court concerning attempted monopoly violations based on specific intent and does so through the misapplication in that context of a relevant market issue not related to those violations. It raises two distinct areas of conflict between the circuits: what kind of market proof is required when the charge is attempted monopoly, and whether sub-markets are to be recognized in the context of petroleum pipelines. It also effectively nullifies the plaintiff's Seventh Amendment right to a verdict of a jury.

Respectfully submitted,

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March 26, 1987

APPENDIX

No. 85- 1729 (L)

CONSUL, LTD.,

Appellant,

versus

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellees.

No. 85-1971

CONSUL, LTD.,

Appellee,

versus

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellants.

No. 85-1988

CONSUL, LTD.,

Appellant,

versus

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem and Greensboro. Richard C. Erwin, District Judge. (C/A 82-574)

Argued: July 14, 1986 Decided: November 14, 1986

Before WIDENER and ERVIN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Dudley H. Chapman (Ward, Lazarus, Grow & Cihlar; Reginald F. Combs; House, Blanco & Osborn, P.A. on brief) for Appellant/cross-Appellee; John L. Jeffers (David D. Sterling; Baker & Botts; Charles F. Vance, Jr.; W. Andrew Copenhaver; Womble, Carlyle, Sandridge & Rice on brief) for Appellee/cross Appellant.

ERVIN, Circuit Judge:

This case never crosses the threshold of antitrust analysis under § 2 of the Sherman Act.[1] There is a mismatch between the assumed natural monopoly power of the defendant, Transco, in the market for transporting gas along its pipeline and the relevant market for Sherman Act purposes that the plaintiff, Consul, has chosen to plead. Consul contended that the relevant product in question was natural gas at the wellhead and the relevant geographical area was comprised of two natural gas fields in Mississippi, plus unnamed sources of natural gas to which Consul might be wrongly denied access by Transco. Even assuming that such an area could be located with greater specificity, there can be no meaningful showing that Transco has monopoly power over this product in that area. As a result of this mismatch, Consul fails to manifest Transco's monopoly power in a relevant market and so loses its case at the threshold.

I. THE PARTIES

Plaintiff-appellant Consul, Ltd. (Consul) is a consulting firm, organized as a North Carolina corporation, that engages in, among other things, the brokering of natural gas. It has done business in the Middle East and Europe, as well as North Carolina, Virginia, Texas, Mississippi and New York. Consul's sole shareholder and "key-man" consultant, Kenneth B. Wilson, teamed principally with a for-

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[1] U.S.C. § 2 (1982).

mer Chairman of the North Carolina Utilities Commission, Tenney I. Deane, in efforts to arrange sources of natural gas for industrial users in the southeastern United States in the period before deregulation of gas.

Defendant-appellees Transco Energy Company, formerly Transco Companies, Inc., and Transcontinental Gas Pipe Line Corporation (collectively "Transco") are Delaware corporations with national offices in Houston, Texas. Transco operates a transcontinental natural gas pipeline that extends from Texas to New York. Transco transports natural gas through the pipeline for a fee. In that endeavor, it is regulated as a public utility by the Federal Energy Regulatory Commission (FERC, previously the Federal Power Commission). Transco also engages in brokering natural gas and, to that extent, it competed with Consul during the time leading up to this litigation.

II. FACTUAL BACKGROUND

This dispute arose during a period of natural gas shortage in the 1970s, The shortage was exacerbated by federal regulations implemented by FERC. The regulations required that whenever natural gas from a particular field was sold in interstate commerce, that gas was thereafter dedicated to interstate sale and subject to interstate price controls. In contrast, intrastate gas was not regulated. Thus intrastate gas generally commanded a higher price than interstate gas. Accordingly, producers of natural gas sometimes withheld gas from the interstate market rather than subject it to price regulation.

To alleviate this problem, FERC adopted, in the early 1970s, certain exceptions to interstate price regulation. Among them were Order 2.68[2] and Order 533.[3] Under

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[2] 18 C.F.R. § 2.68 (1986), *removed*, 51 Fed. Reg. 11716 (April 7, 1986) (removal effective April 1, 1986).

[3] 18 C.F.R. § 2.79 (1986).

Order 2.68, producers could contract for the interstate sale of gas for sixty days without price regulation. No prior FERC approval was required for 2.68 sales. Under Order 533, producers could arrange two-year interstate sales without price regulation. Prior FERC approval, however, was required for 533 sales.

The Greens Creek natural gas field in Mississippi covers about four square miles near Transco's pipeline. The gas is owned by four separate producers, none of whom is a party in this case. In 1977, Transco sought to broker gas from this field. Because the Greens Creek producers wished to avoid interstate price regulation, Transco applied for an exception from FERC: a two-year "limited term certificate," which was similar to the Order 533 exception.[4] FERC rejected the application.

Subsequently, Consul sought to broker the Greens Creek gas to its clients in the southeast. Transco was aware of these efforts. Consul proposed that the producers seek FERC approval for a two-year 533 sale, and while the 533 application was pending, immediately make a series of sixty-day 2.68 sales. All gas was to be transported through Transco's pipeline. The Greens Creek producers agreed to this scheme, pending a demonstration of Consul's ability to make the necessary arrangements.

To this end, Consul arranged a 2.68 sale from another field, the Holiday Creek field in Mississippi, to Public Service Company of North Carolina. Gas under that contract began to flow through Transco's pipeline on May 21, 1978, at the request of Public Service. Transco learned of Consul's involvement in the Holiday Creek sale later, after the gas had begun to flow. Transco was hostile to Consul's efforts because it wished to broker the Greens Creek gas to the exclusion of Consul. For disputed reasons, Transco

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[4] *See* 18 C.F.R. § 2.70(b)(3) (1986) (codifying FERC Opinion 699-B, 39 Fed. Reg. 33206 (Sept. 16, 1974)).

cut off the gas flowing under the Public Service/Holiday Creek contract on May 24, 1978. This gas supply was restored for the duration of the sixty-day 2.68 sale after negotiations between Consul and Transco. Nevertheless, Consul lost commissions.

Based on the Holiday Creek sale, Consul was able to arrange four additional 2.68 sales from the Greens Creek field to Commonwealth Natural Gas in Virginia, to occur on July 1, September 1, November 1 and December 1, 1978. The Greens Creek producers also agreed to engage in a subsequent 533 sale. Transco initially refused to transport the gas under the contracts because of Consul's involvement. After negotiations, however, Transco agreed to transport the 2.68 sale scheduled for July 1. Transco also agreed to apply for FERC approval of the 533 sale, applications for such sales generally being made by the pipeline company.

While the 533 application was pending, Congress was formulating the Natural Gas Policy Act (NGPA). The NGPA began deregulation of natural gas prices.[5] The price disparity between interstate and intrastate gas began to be eliminated. Accordingly, 2.68 and 533 sales were no longer especially advantageous. In November, 1978, the NGPA became law.[6] FERC approved the 533 application at around the same time, but at a natural gas price that was not attractive to the Greens Creek producers. The producers then declined to contract with Consul for natural gas sales and arranged instead a favorable, long-term contract with Transco.

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[5] For a summary of the regulatory system under the NGPA, see Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 Harv. L. Rev. 345, 348-51 (1983).

[6] *See* Pub. L. No. 95-621, 92 Stat. 3352 (codified at 15 U.S.C. §§ 3301-3432 (1982)).

III. LITIGATION BELOW

Consul brought this action following the failure of its 533 sale. Generally, Consul alleges that Transco conspired and used its monopoly power over the pipeline to preclude Consul from arranging purchases from the Greens Creek and Holiday Creek fields in violation of §§ 1 and 2 of the Sherman Act.[7] With regard to the monopoly claim, Consul alleges that it lost commissions on the 2.68 sales in connection with Transco's refusal to facilitate those sales. Consul claims the loss of further commissions from the 533 sale on the basis of Transco's delay in filing the 533 application and obstructionism on the part of Transco, which allegedly caused FERC to postpone action on the application until passage of the NGPA. That is, Consul asserts that if Transco had not delayed the 533 approval process, the 533 sale would have been consummated, resulting in commissions for Consul. Consul also sought injunctive relief. That equitable claim is the subject of a separate proceeding.

Before trial, Transco moved for partial summary judgment on, among other things, the 533 claim. Transco argued that Consul offered insufficient evidence that Transco caused any damage to Consul in connection with the 533 sale. The district court granted the partial summary judgment in favor of Transco on October 31, 1984.

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[7] Sherman Act § 1, 15 U.S.C. § 1 (1982), is directed toward concerted activity: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal," with certain provisions concerning resale price maintenance.

Sherman Act § 2, 15 U.S.C. § 2 (1982), reaches single-firm efforts at monopolization as well as conspiracies: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

At trial, the district court directed a verdict against Consul on its claim under § 1 of the Sherman Act, since there was no evidence of a conspiracy. Consul does not appeal that ruling.

As to the § 2 claim, the jury found that Consul was damaged in the amounts of $24,000 for the interruption of gas from the Holiday Creek 2.68 sale and $216,300 for the loss of sales from Greens Creek. After entry of judgment for treble those damages pursuant to § 4 of the Clayton Act,[8] Transco properly moved for judgment notwithstanding the verdict ("n.o.v."). The district court granted this motion in two respects: first, that there was no evidence that Holiday Creek was a relevant market, hence the $24,000 award could not stand, and second, that $62,100 of the damages awarded by the jury for the fourth 2.68 sale from Greens Creek had no basis in the record, and hence could not stand. The district court also denied Consul's motion to transfer the injunctive aspect of the case to the United States District Court for the Western District of North Carolina, Charlotte Division. Final judgment, after the damages were trebled, was entered for $462,600, on August 26, 1985.

IV. DISPOSITION ON APPEAL

Consul now appeals the partial summary judgment entered against it on the 533 claim and the judgment n.o.v. on the Holiday Creek and the fourth Greens Creek 2.68 sales, as well as the denial of transfer. Transco cross-appeals the adverse jury awards on the first three Greens Creek 2.68 sales. Jurisdiction is proper under 28 U.S.C. § 1291 (1982). We conclude that the district judge correctly found that Consul failed to establish Holiday Creek as a relevant market for Sherman Act § 2 purposes, and so affirm that part of the judgment n.o.v. We further con-

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[8] 15 U.S.C. § 15 (1982).

clude that the same failure is equally fatal to the entire case. Consul's claim may sound in tort, but it is insufficient to invoke the protection of the antitrust laws. Thus, we affirm the partial summary judgment on the 533 claim and the judgment n.o.v. as to the fourth Greens Creek claim. We reverse the district court's refusal to grant judgment n.o.v. on the first three Greens Creek claims. The denial of the motion to transfer is affirmed as within the district court's discretion.

V. DISCUSSION

A. The Relevant Market Requirement

Proof of a relevant market is the threshold for a Sherman Act § 2 claim. The plaintiff must establish the geographic and product market that was monopolized. This proposition has been practically incontrovertible since *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). *See, e.g., American Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350, 1366-67 (Fed. Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 95 (1984); *RCM Supply Co. v. Hunter Douglas, Inc.*, 686 F.2d 1074, 1076 (4th Cir. 1982); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 711-12 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975); *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296, 305 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 286-87 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973).[9]

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[9] Cases to the contrary appear in the Ninth Circuit. *See, Blanton v.*

Consul, undaunted by the weight of this authority, claims to have found three theories on which § 2 liability can be rested without reference to a relevant market. In the alternative, Consul proffers the two natural gas fields, Holiday Creek and Greens Creek, as well as "all other sources of natural gas from which there is no presently economically feasible alternative means of transportation other than Defendants' pipeline"[10] as the geographical limits of a relevant market, and natural gas at the wellhead as the product in question. We are not convinced by either branch of the argument.

Consul strenuously urges that there is more than one type of § 2 claim; in fact, it argues, there are at least four types, of which three—"leveraging" cases, "essential facility" cases, and "market foreclosure" cases—are not concerned with market definition. We take no issue with the usefulness of Consul's typology or the aptness of these labels in describing forms of action under the Sherman Act. The fact remains that a relevant market must be proven under any of these theories. This is clear from a reading of the authorities cited by Consul. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 369 (1973) ("The aggregate of towns in Otter Tail's service area is

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Mobil Oil Corp., 721 F.2d 1207, 1213 (9th Cir. 1983) (plaintiff not required to prove a relevant market to show attempted monopolization under §2 when defendant engaged in *per se* violations of §1), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1874 (1985); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 903 (1964) (decided prior to *Walker Process*). But as the *Blanton* court made clear, the Ninth Circuit waives the requirement of proving a relevant market only in cases involving attempted monopolization rather than actual monopolization and in which the plaintiff shows either predatory conduct or a *per se* violation of §1. *Blanton*, 721 F.2d at 1214. We follow the rule established in this and most of our sister circuits, that proof of a relevant market is always required.

[10] Complaint at para. 30(c).

the geographic market in which Otter Tail competes for the right to serve the towns at retail.").[11]

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[11] Consul cites numerous other cases in its attempt to allay the problem of market definition. None is persuasive. Consul finds the beginnings of "essential facility" theory is *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), which, as Consul notes, predates the recognition of market definition as the indispensable element in Sherman Act analysis in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1955). Nevertheless, *Terminal Railroad* evinces considerable concern for the particular effects of that defendant's actions on a particular market for rail transportation: St. Louis. *See*, 224 U.S. at 392-407; *see generally* Troy, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 Colum. L. Rev. 441 (1983) (arguing that essential facility cases fit, at the threshold, within traditional § 2 analysis, including market definition). This is the type of concern not presented by Consul's evidence, which cannot and does not establish the degree to which Transco has market power over natural gas at the wellhead. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), to which we are also referred, is wholly inapposite: in that case the question of monopolization had been settled in a prior and separate suit. *See id.* at 369.

As for "leverage" theory, Consul itself acknowledges the need to prove monopolization in one market before examining the "leveraging" of that monopoly power in the separate market. In the case of *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), cited by Consul, the relevant geographical market was clearly established: seventy-odd small towns in the mid-east. Similarly, in *United States v. Griffith*, 334 U.S. 100 (1948), the monopolistic practices involved corporations in Oklahoma, Texas and New Mexico that owned the only movie theater in each of fifty-three towns.

Nor do the "market foreclosure" cases to which Consul refers us offer a way around the requirement of market definition. The Court in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), struggled with the proper extent of the market for newspapers. *See id.* at 610 ("Once granted that the volume of commerce affected was not 'insignificant or insubstantial,' the Times-Picayune's market position becomes critical to the case.") (citation omitted). Likewise in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the Court examined the particular details of commerce in communication in and out of Lorain, Ohio, concluding that the Journal had "a substantial monopoly in its area." *Id.* at 154.

As Justice Frankfurter first noted,[12] and as this court recently reasserted, the relevant geographic market is the area in which buyers or sellers of the relevant product effectively compete. *See Satellite Television v. Continental Cablevision*, 714 F.2d 351, 357 (4th Cir. 1983). The formulation approved by this court in *RCM Supply* is helpful: "the geographic market should consist of *an area in which the defendants operate and which the plaintiff can reasonably turn to for supplies.*" 686 F.2d at 1077 (emphasis in original). *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-34 (1961). The penultimate question, towards which this preliminary inquiry into market definition is directed, is whether the defendant has market power: the ability to raise prices above levels that would exist in a perfectly competitive market.[13] The geographic demarcation should not be too tightly drawn, unless clear evidence exists that potential competitors outside the region are hindered from entering. A market drawn too tightly, either in geographic terms that exclude potential suppliers or in product terms that exclude potential substitutes, creates the illusion of market power where none may exist. *See Jayco Systems v. Savin Business Machines Corp.*, 777 F.2d 306, 319-20 (5th Cir. 1985), *cert. denied*, ___ U.S. ___,55 U.S.L.W. 32004 (October 7, 1986); *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1580-81 (11th Cir. 1985); *cf. American Football League v. National Football League*, 323 F.2d 124, 129-30 (4th Cir. 1963) (describing limits on market in terms of the defendant's activity, but viewing that activity broadly to include all locations where the defendant might choose to

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[12] *See Standard Oil Co. (California) v. United States*, 337 U.S. 293 U.S. 293, 299 n.5 (1949).

[13] *See, e.g.*, II P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* para. 517 (1978); R. Posner, *Economic Analysis of Law* 195-201 (2d ed. 1972).

do business). Such a misleading start in antitrust analysis, always a difficult area for judicial resolution, *cf. Standard Oil Co. (California) v. United States*, 337 U.S. 293, 322 (1948) (Jackson, J., dissenting) (noting the difficulty raised by economic problems presented for judicial action in Clayton Act cases), makes accurate determination of the ultimate question—whether the antitrust laws have been violated—impossible.

B. The Market Pleaded

In this case, Consul urges that the relevant product is natural gas at the wellhead. The relevant geographical area pleaded is a strange amalgam of two natural gas fields in Mississippi plus any other areas in which Transco controls access to natural gas by virtue of the pipeline, but does not own the gas and would not transport it if Consul was able to broker it.

There is no way to establish Transco's market power in the market for natural gas at the wellhead on the basis of the above geographical limitation and the evidence presented by the parties.[14] The evidence did indicate that the producers at Greens Creek had numerous opportunities to sell gas to a large number of buyers other than Transco; that Transco bought only a small percentage of the gas produced in the county in which both fields lie; that Transco purchased gas all along its line from Texas to New York; and that the producers at Greens Creek considered attachment to the intrastate pipeline network a viable op-

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[14] The Fifth Circuit has held that a natural gas field constituted a relevant geographic market under § 2 of the Sherman Act. *See Woods Exploration & Production Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 414 U.S. 1047 (1972). Both parties in that case were owner/extractors of the gas field; their competition was tied to that field. In contrast, Transco can operate anywhere along the pipeline, and Consul is in the business of finding natural gas wherever it exists. Nothing inherent in the market, as Consul presented that market to us, links their competition to any one or two particular fields.

tion. There is no indication that Consul's efforts to find sources of gas elsewhere in the country were foreclosed by Transco's power in the market. There is no reason to believe that circumstances rendered the two fields around which the instant events occurred economically significant portions of the national market for natural gas. *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (regarding Clayton Act § 7). There is no way to measure Transco's market power in an area as ethereal as "sources of natural gas not owned by Transco but in close proximity to their pipeline and which would not be available to Consul as a broker under Transco's policies." While the market may not be measurable in "metes and bounds," *see Times-Picayune Publishing*, 345 U.S. at 611, it should be demonstrable in other than purely hypothetical terms. In sum, there is no reason to believe that the geographic market pleaded covered Transco's activities in a way that would encompass the area of effective competition between the parties, as brokers of natural gas.[15]

We conclude that the district court was correct in granting judgment n.o.v. on the fourth Greens Creek 2.68 contract and in granting summary judgment on the 533

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[15] *Cf.* Pierce, *supra* note 5, at 381 (discussing Transco's power in the market for transportation of natural gas into North Carolina). This case in no way forecloses a showing that a natural monopolist has violated the Sherman Act in a way analogous to *Otter Tail*. The plaintiff here, by focusing on the localized production source in Mississippi, has not presented us with the facts about the relevant market necessary for such a showing.

contract.[16] We reverse the refusal to grant judgment n.o.v. on the other 2.68 contracts.

AFFIRMED IN PART AND REVERSED IN PART.

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[16] Consul raises several points on appeal in connection with the granting of summary judgment, which points are mooted by the failure to prove a relevant market. We therefore decline to discuss the adequacy of hearing afforded to Consul on its charge of regulatory obstruction, or the sufficiency of the evidence that Consul presented. All of the contested evidence, if admitted, would not establish an *antitrust* violation under Sherman Act § 2, absent a clearer showing of Transco's monopoly power in a relevant market.

86 1549

No. 86-

Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSUL, LTD.

Petitioner,

v.

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

C-82-574-WS

CONSUL, LTD.,

Plaintiff,

v.

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC. and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Defendants.

FILED

AUG 16 1985

MEMORANDUM

This case is before the court pursuant to two motions as follows: (1) motion by the defendant for judgment notwithstanding the verdict, or in the alternative, for a new trial, and (2) motion by plaintiff to transfer this case to the Western District of North Carolina pursuant to 28 U.S.C. § 1404(a), which provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district of division where it might have been brought." This motion of the plaintiff relates to "alleged equitable relief" that the plaintiff contends it is entitled to.

The court having considered the record before it, including the pleadings, exhibits, evidence presented at trial, and argument of counsel, rules on the defendant's motion for JNOV as follows:

1. With reference to defendant's contention that it is entitled to JNOV on the theory that the plaintiff's evidence did not establish a relevant market sufficient for the case to be considered by the jury, the court is of the opinion that the motion should be allowed as to Holiday Creek Field as being a relevant market and denied as to Green Creek Field as being a relevant market.

2. Defendant contends that plaintiff failed to present any evidence of any injury caused by Transco. The court is of the opinion that this portion of the motion JNOV should be allowed in part and denied in part. The motion is allowed as to the jury award to Consul of $24,000 for the interruption of service to Public Service. This results by reason of the court's holding that Holiday Creek Field was not a relevant market area.

3. The court has reviewed the evidence presented at trial. From such review, the court concludes that there was sufficient evidence in the record from which a jury could find that plaintiff was damaged in the amount of $154,200. This amount is to be multiplied by three which give plaintiff total damages of $462,600. The court has allowed the motion JNOV with reference to $62,100 which was awarded for contracts entered into for the period between January 1, 1979 and February 1, 1979.

4. With reference to plaintiff's motion to transfer to the United States District Court for the Western District of North Carolina, a case was filed on May 13, 1985 entitled *Carolina Utilities Customers Associates, Inc., v. Transco Energy Co. and Transcontinental Gas Pipeline Corp.* Case No. C-85-309-M. Plaintiff, now in the case before this court, contends that there are certain similarities between the Western District case and the request for injunctive relief in this case. The court is of the opinion that there has not been any showing that the transfer and merger of the two cases in question would be of convenience to any of the witnesses or the parties, in the interest of justice, or

would save judicial time. Therefore, and the court in its discretion will deny the plaintiff's motion.

The court will enter judgment consistent with this memorandum in lieu of the Judgment entered on June 12, 1985.

/s/ RICHARD ERVIN
United States District Judge

August 26, 1985

Dec. 30, 1986

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 85-1729
85-1971
85-1988

CONSUL, LTD.,

Appellant,

versus

TRANSCO ENERGY COMPANY, ETC., *et al,*

Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Widener and Judge Haynsworth.

For the Court,
/s/ JOHN M. GREACEN
Clerk

Supreme Court, U.S.
FILED
APR 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSUL, LTD.,

Petitioner,

v.

TRANSCO ENERGY COMPANY,
formerly known as TRANSCO COMPANIES, INC.,
and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. May a plaintiff recover under Section 2 of the Sherman Act absent proof of a relevant market in which the defendant exercised market power?

LIST OF PARTIES

Petitioner: Consul, Ltd., a consulting firm of which the principals are Kenneth B. Wilson and Tenney I. Deane, Jr.

Respondents: Transco Energy Company, formerly known as Transco Companies, Inc., and Transcontinental Gas Pipe Line Corporation. Affiliates of Respondents are as follows:

Transcontinental Gas Pipe Line Corporation (TGPL)
Transco Gas Company
Transco Exploration Company (TXC)
Transco Exploration Partners, Ltd.
TXP Operating Company (TXPO)
Bayou Hydrocarbons, Inc.
Gasco Insurance Company Limited
Transcontinental Terminals, Inc.
TCI Realty, Inc.
Transmat Corporation
Trans-Jeff Chemical Corporation
Trans-Virginia Public Service Corporation
Transco Canada Corporation
Transco Coal Company
Transco Coal Gas Company
Transco Coal Pipeline Company
Transco Cogeneration Company
Transco Coal Services Company
Transco Energy Investment Company
Transco Energy Ventures Company
Transco Gas Clearing House Company
Transco Gas Services Company, Inc.

Transco Gas Supply Company
Transco Gas Gathering Company
Transco Hydrocarbons Company
Transco International N.V.
Transkentucky Transportation Railroad, Inc.
Transco LPG Company
Transco-New England Pipeline Company
Transco Niagara Pipeline Company
Transco Offshore Gathering Company
Transco Offshore Pipeline Company
Transco Petro Source Company
Transco Production of Canada Ltd.
Transco Propane Products Company
Transco Propane Supply Company
Transco Resources, Inc.
Border Gas, Inc.
C & T Pipeline, Inc.
Dixie Pipeline Company
NESP Supply Corp.
Transco Synfuels Company
Transco Terminal Company
Transco Tower Realty, Inc.
Transeastern Gas Pipeline Company, Inc.
Transylvania Gas Pipeline Company, Inc.
TASC, Inc.
TTI Systems, Inc.
Troy Potter Company
Bell County Coal Corporation
Blue Crystal Coal Sales Co.
Petro Source Hydrocarbon Services
Petro Source Refining Corporation
Petro Source Products Company
Texon Corporation
Petrosource Transportation
Petro Source Resources
U-T Offshore System
Caroline-Transco Pipeline Company
Transco Energy Marketing Company (TEMCO)
Voyager Energy Company
Wildcat Coal Sales, Inc.
Valley View Coal, Inc.

The Twenty Two Sixty Five Corporation
Sizemore Trucking, Inc.
River Coal Company
Randall Fuel Company, Inc.
Pro-Land, Inc.
Polls Creek Coal Co., Inc.
Oswayo Mining, Inc.
New Brush Creek Mining, Inc.
Morgan Coal Company
Ken-Coal, Inc.
Inland Ports, Inc.
Indian Head Mining Company
Farmer Coal Company, Inc.
Cross Mtn. Coal, Inc.
Beech Grove Processing Company
Aminex Coal Development Corporation
Aminex Coal Corporation
Alpine Coal, Inc.
Alpha Coal Company, Inc.
Typo Mining, Inc.
Mountain Clay, Inc.
Leeco, Inc.
Ken Coal Company
Interstate Coal Company, Inc.
Highland Coal, Inc.
Bituminous-Laurel Mining, Inc.
Aceco, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-1549

CONSUL, LTD.,

Petitioner,

v.

TRANSCO ENERGY COMPANY,
formerly known as TRANSCO COMPANIES, INC.,
and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Respondents.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Transco adopts the Statement of the Case contained in the Fourth Circuit's opinion below. (Appendix at pp. 3a-8a). The opinion below is reported at 805 F.2d 490.

SUMMARY OF ARGUMENT

It is difficult to understand how this case could be of any real significance to anyone besides the immediate parties. The case arose out of a factual context which is peculiar and unlikely to recur. The Fourth Circuit relied upon unbroken lines of precedent from this Court in deciding the case below, and the allegedly conflicting decisions relied upon by Petitioner are clearly distinguishable.

REASONS FOR DENYING THE WRIT

I. The Facts of the Case Are Peculiar and Unlikely to Recur.

This case is predicated upon unusual facts as well as a unique allegation: that Transco, a major interstate pipeline system, acquired and maintained a monopoly in the purchase of natural gas from the Holiday Creek and Greens Creek fields in Jefferson Davis County, Mississippi, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982). Central to this antitrust claim is Petitioner's allegation that the Greens Creek and Holiday Creek fields constituted relevant markets in which Transco exercised monopoly power. Throughout the history of this case, however, neither Petitioner nor Transco uncovered any other case in which a gas pipeline was alleged to have monopolized the purchase of gas from any particular area, much less from the gas-rich Gulf Coast area where numerous pipelines have historically competed for supplies.[1]

Not only was the allegation Petitioner sought to establish unique, but the case arose out of the gas shortage conditions in the mid-1970s which brought about substantial deregulation of the natural gas industry. This deregulation in turn triggered an excess of gas supply that has endured for years. This excess of supply was also in part the result of another new development: competition for industrial sales from suppliers of alternative fuels. In other words, this case arose in an economic-competitive-regulatory framework that has changed entirely. It does not address current conditions in the natural gas industry, nor can it have any broad interest.

The facts of this case occurred prior to the November 1978 enactment of the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (1982) (the "NGPA"). During this period, federal regula-

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[1] Petitioner cites a case involving anticompetitive conduct by a petroleum pipeline, *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), and claims that the opinion below is in conflict with this case. *Woods*, however, is readily distinguishable from the case at bar. *See infra* p. 7.

tions mandated that the sale of gas from a given field for shipment through an interstate pipeline would forever dedicate gas from that field to interstate commerce and thus permanently subject it to federal price regulation. As a result of these regulations, many gas producers, including those of the Greens Creek and Holiday Creek fields, refused to sell their gas to interstate pipelines. [2589-94, 2616].

Transco's entire system of customers was under serious curtailment from 1975 through 1978 due to the shortage of supply in the interstate market. [1405A-1406, 1521A]. Pursuant to a 1975 settlement agreement among Transco, the Federal Power Commission ("FPC"), all of Transco's distribution customers, and various state utility commissions, Transco acted as the agent for its distribution customers during this period in arranging for the delivery of emergency supplies of gas under the FPC's exceptions to interstate price regulation. [1276-78]. In order to maximize the total supply of gas for its entire system under the settlement agreement, Transco established criteria consistent with federal regulations by which to determine whether it would transport emergency gas for just one particular customer. [1275]. Since its entire system had a great need for long-term supplies of gas, Transco determined that it would ship such emergency gas for one particular customer only when the source of the gas was truly unavailable to Transco's entire system [1308], and Transco would refuse to ship such emergency gas when Transco was trying to purchase the gas for its entire system to benefit all of its customers. [1278A, 1331].

Petitioner brokered a two-year sale of emergency gas under Order 533 from the Greens Creek field to various industrial clients. Pending the necessary approval of the 533 sale from the FPC, Petitioner proposed a series of interim 60-day sales under Order 2.68, which did not require prior FPC approval, from Greens Creek to Commonwealth Natural Gas ("CNG"), a gas distributor in Virginia which purchased 70% of its supplies from a pipeline other than Transco. [2577, 2584-85]. Transco initially refused to transport the Greens Creek gas since Transco was trying to purchase it for the benefit of its entire system. Transco

capitulated, however, after the producers threatened never to sell the gas to Transco if Transco did not go along. [1215, 1628C, 1344-45]. Transco thereby agreed to process the 533 application, and to ship the first interim 60-day sale for Petitioner's benefit.

After the nearly contemporaneous modification of the terms of the 533 sale by the FERC, which was tantamount to rejection so far as the producers were concerned, and the passage of the NGPA, which removed the producers' long-standing objections to interstate sales, the producers refused to commit any gas to Petitioner. Petitioner then initiated this suit, alleging that Transco acquired and maintained a monopoly in the purchase of natural gas from the two Mississippi fields.[2]

It is clear that Petitioner's allegations arose directly out of the shortage conditions which existed in 1978, the regulatory framework in place prior to the NGPA, and Transco's transportation policy which was enacted pursuant to the 1975 settlement agreement. The shortage conditions, of course, have long been replaced by a glut of gas. The NGPA became law, the authority for the 60-day 2.68 sales for which Petitioner sued Transco was repealed, *see* 51 Fed. Reg. 11,716 (April 7, 1986) (removal effective April 1, 1986), and the FERC promulgated a comprehensive program to facilitate the transportation of gas to any end-user requesting service. *See* Amendments to 18 C.F.R. Parts 2, 157, 250, 284, 375, and 381, 50 Fed. Reg. 42,408 (October 18, 1985). In light of these fundamental changes, Transco and other interstate pipelines revised their policies with respect to transporting gas for particular customers. [1332-33, 1370-73].

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[2] Transco won a summary judgment (on grounds other than relevant market) with respect to Petitioner's alleged damages from the FERC's effective denial of the 533 sale. Petitioner then went to trial and got a partial jury verdict on alleged damages from not having made all of the proposed interim 2.68 60-day sales. While Petitioner emphasizes that Transco is the only interstate gas pipeline serving North Carolina, the 60-day sales on which it went to trial were to have been to CNG in Virginia, which received 70% of its supplies from another pipeline. The Fourth Circuit rejected all of Petitioner's claims on failure to establish a relevant market.

Finally, the FERC found in its 1985 amendments to its rules and regulations that

> as a result of physical and technological changes that have taken place as the industry has grown and matured over the last fifty years, a given supply of the natural gas commodity can now be transported — by front haul, back haul, exchange or displacement — to points throughout the continental United States. As a result, as a technical matter, producers of natural gas can market their supplies in an essentially national market while individual customers or resellers of gas (such as the local gas utilities) can obtain supplies from a variety of sources.

Id. at 42,411. The FERC added that customers have access to gas "in virtually any producing area" in the country, and a producer similarly can "seek markets for his gas virtually anywhere" in the country. *Id.* at 42,413. The FERC concluded that "this is not economic theory but bustling commercial reality." *Id.*

The unique market conditions, regulatory framework, and industrial policies which triggered this dispute are long gone, and it is difficult to see how they could ever return. Producers no longer have the incentives to avoid interstate sales, pipelines have changed their transportation policies, the regulatory framework has been completely overhauled, and as the FERC found, there is truly a nationwide market for the purchase and sale of natural gas at the wellhead. It therefore appears that the odds of a case similar to this arising are slim, and this Court accordingly should not exercise its discretionary jurisdiction.

II. The Fourth Circuit Relied Upon Unbroken Lines of Precedent From This Court.

The thrust of Petitioner's argument below, and for a Writ of Certiorari, is its claim that it need not establish a relevant market to recover under Section 2 of the Sherman Act upon proof of "leveraging," "essential facilities," or "market foreclosure." *See*

Petition pp. 14-20. The Fourth Circuit rejected this contention, noting that

> [p]roof of a relevant market is the threshold for a Sherman Act §2 claim. The plaintiff must establish the geographic and product market that was monopolized. This proposition has been practically incontrovertible since *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965).

App. p. 8a (citations omitted). In concluding that "[t]he fact remains that a relevant market must be proven under any of [Petitioner's] theories," App. p. 9a, the Fourth Circuit further relied upon *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961), and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). *See* App. pp. 9a-11a.[3] Contrary to Petitioner's conclusion, the Fourth Circuit's opinion was decided under an unbroken line of cases from this Court, and is not inconsistent with any of this Court's decisions.

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[3] Petitioner cites no cases which dispense with the need to establish the relevant market under Section 2 of the Sherman Act. This Court recognized "market definition as the indispensible element in Sherman Act analysis" in the 1956 *du Pont* decision. App. p. 10a. Virtually all of the cases cited by Petitioner predate *du Pont*, and as the Fourth Circuit correctly noted, even the pre-*du Pont* cases indicate considerable concern for the competitive effects of the defendant's conduct in a particular market. *Id.* The post-*du Pont* cases cited by Petitioner are plainly inconsistent with Petitioner's argument. In *MCI Communications, Inc.* v. *American Telephone & Telegraph Co.*, 708 F.2d 1081, 1207-08 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), the finding of liability under the essential facilities doctrine was expressly conditioned upon the finding of a relevant market. In *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961), the defendant allegedly monopolized the consumption of coal in Florida. The plaintiff argued that the relevant geographic market was, at most, Florida and Georgia. The Court rejected plaintiff's contention, holding that the relevant market was the area in which the 700 producers who could sell to defendant effectively competed. *Id.* at 330-33.

III. The Fourth Circuit's Opinion Creates No Conflicts With Any Other Circuit.

Petitioner claims that the opinion below conflicts with the Fifth Circuit's decision in *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), because *Woods* "held that a single natural gas field can be a relevant market." Petition at 22. The Fourth Circuit below did not hold that a single gas field could *never* be a relevant market; it simply held that Petitioner failed to prove that the Greens Creek and Holiday Creek fields were relevant markets. Moreover, *Woods* is factually distinguishable. Plaintiff and defendants in *Woods* were owners and extractors of gas from the same field, and as such, their competition was tied to that field. The court in *Woods* found that the defendants' pipeline was "the only available outlet" for plaintiff's gas. *Id.* at 1300. In contrast, as the Fourth Circuit pointed out, the producers of the Greens Creek and Holiday Creek fields had numerous viable opportunities to sell to buyers other than Transco, and nothing linked Transco's and Petitioner's competition to any particular fields. *See* App. p. 12a. The opinion below plainly creates no conflict with *Woods*.

Petitioner also claims that the opinion below is in conflict with cases holding that relevant markets may also have "submarkets." Petition p. 22. The opinion below, however, did not reject the concept of submarkets, and the allegedly conflicting statement cited by Petitioner is not even found in the opinion below. Petitioner's quotation is from *Satellite Television & Associated Resources, Inc.* v. *Continental Cablevision of Virginia, Inc.*, 714 F.2d 351, 355 n.5 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984). Since the opinion below by no means rejected the concept of submarkets, it clearly creates no conflict with cases which recognize the concept.

CONCLUSION

This case arose out of peculiar facts which are unlikely to recur. The Fourth Circuit's opinion below relied upon an unbroken line of cases from this Court, and creates no conflicts with any other circuit. The factual underpinning for the Fourth Circuit's application of precedents — that the producers of the particular fields had numerous potential purchasers of their gas besides Transco — was undisputed. This case does not merit the exercise of this Court's discretionary jurisdiction, and Transco therefore prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied in all respects.

Respectfully submitted,

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April 24, 1987

APPENDIX

No. 85- 1729 (L)

CONSUL, LTD.,

Appellant,

versus

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellees.

No. 85-1971

CONSUL, LTD.,

Appellee,

versus

TRANSCO ENERGY CORPORATION, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellants.

No. 85-1988

CONSUL, LTD.,

Appellant,

versus

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem and Greensboro. Richard C. Erwin, District Judge. (C/A 82-574)

Argued: July 14, 1986 Decided: November 14, 1986

Before WIDENER and ERVIN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Dudley H. Chapman (Ward, Lazarus, Grow & Cihlar; Reginald F. Combs; House, Blanco & Osborn, P.A. on brief) for Appellant/cross-Appellee; John L. Jeffers (David D. Sterling; Baker & Botts; Charles F. Vance, Jr.; W. Andrew Copenhaver; Womble, Carlyle, Sandridge & Rice on brief) for Appellee/cross Appellant.

ERVIN, Circuit Judge:

This case never crosses the threshold of antitrust analysis under § 2 of the Sherman Act.[1] There is a mismatch between the assumed natural monopoly power of the defendant, Transco, in the market for transporting gas along its pipeline and the relevant market for Sherman Act purposes that the plaintiff, Consul, has chosen to plead. Consul contended that the relevant product in question was natural gas at the wellhead and the relevant geographical area was comprised of two natural gas fields in Mississippi, plus unnamed sources of natural gas to which Consul might be wrongly denied access by Transco. Even assuming that such an area could be located with greater specificity, there can be no meaningful showing that Transco has monopoly power over this product in that area. As a result of this mismatch, Consul fails to manifest Transco's monopoly power in a relevant market and so loses its case at the threshold.

I. THE PARTIES

Plaintiff-appellant Consul, Ltd. (Consul) is a consulting firm, organized as a North Carolina corporation, that engages in, among other things, the brokering of natural gas. It has done business in the Middle East and Europe, as well as North Carolina, Virginia, Texas, Mississippi and New York. Consul's sole shareholder and "key-man" consultant, Kenneth B. Wilson, teamed principally with a former Chairman of the North Carolina Utilities Commission, Tenney I. Deane, in efforts to arrange sources of natural gas for industrial users in the southeastern United States in the period before deregulation of gas.

Defendant-appellees Transco Energy Company, formerly Transco Companies, Inc., and Transcontinental Gas Pipe Line Corporation (collectively "Transco") are Delaware corporations with national offices in Houston, Texas. Transco operates a transcontinental natural gas pipeline that extends from Texas to New York. Transco transports natural gas through the pipeline

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[1] 15 U.S.C. § 2 (1982).

for a fee. In that endeavor, it is regulated as a public utility by the Federal Energy Regulatory Commission (FERC, previously the Federal Power Commission). Transco also engages in brokering natural gas and, to that extent, it competed with Consul during the time leading up to this litigation.

II. FACTUAL BACKGROUND

This dispute arose during a period of natural gas shortage in the 1970s. The shortage was exacerbated by federal regulations implemented by FERC. The regulations required that whenever natural gas from a particular field was sold in interstate commerce, that gas was thereafter dedicated to interstate sale and subject to interstate price controls. In contrast, intrastate gas was not regulated. Thus intrastate gas generally commanded a higher price than interstate gas. Accordingly, producers of natural gas sometimes withheld gas from the interstate market rather than subject it to price regulation.

To alleviate this problem, FERC adopted, in the early 1970s, certain exceptions to interstate price regulation. Among them were Order 2.68[2] and Order 533.[3] Under Order 2.68, producers could contract for the interstate sale of gas for sixty days without price regulation. No prior FERC approval was required for 2.68 sales. Under Order 533, producers could arrange two-year interstate sales without price regulation. Prior FERC approval, however, was required for 533 sales.

The Greens Creek natural gas field in Mississippi covers about four square miles near Transco's pipeline. The gas is owned by four separate producers, none of whom is a party in this case. In 1977, Transco sought to broker gas from this field. Because the Greens Creek producers wished to avoid interstate price regulation, Transco applied for an exception from FERC: a two-year

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[2] 18 C.F.R. § 2.68 (1986), *removed*, 51 Fed. Reg. 11716 (April 7, 1986) (removal effective April 1, 1986).

[3] 18 C.F.R. § 2.79 (1986).

"limited term certificate," which was similar to the Order 533 exception.[4] FERC rejected the application.

Subsequently, Consul sought to broker the Greens Creek gas to its clients in the southeast. Transco was aware of these efforts. Consul proposed that the producers seek FERC approval for a two-year 533 sale, and while the 533 application was pending, immediately make a series of sixty-day 2.68 sales. All gas was to be transported through Transco's pipeline. The Greens Creek producers agreed to this scheme, pending a demonstration of Consul's ability to make the necessary arrangements.

To this end, Consul arranged a 2.68 sale from another field, the Holiday Creek field in Mississippi, to Public Service Company of North Carolina. Gas under that contract began to flow through Transco's pipeline on May 21, 1978, at the request of Public Service. Transco learned of Consul's involvement in the Holiday Creek sale later, after the gas had begun to flow. Transco was hostile to Consul's efforts because it wished to broker the Greens Creek gas to the exclusion of Consul. For disputed reasons, Transco cut off the gas flowing under the Public Service/Holiday Creek contract on May 24, 1978. This gas supply was restored for the duration of the sixty-day 2.68 sale after negotiations between Consul and Transco. Nevertheless, Consul lost commissions.

Based on the Holiday Creek sale, Consul was able to arrange four additional 2.68 sales from the Greens Creek field to Commonwealth Natural Gas in Virginia, to occur on July 1, September 1, November 1 and December 1, 1978. The Greens Creek producers also agreed to engage in a subsequent 533 sale. Transco initially refused to transport the gas under the contracts because of Consul's involvement. After negotiations, however, Transco agreed to transport the 2.68 sale scheduled for July 1. Transco also agreed to apply for FERC approval of the 533 sale, applications for such sales generally being made by the pipeline company.

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[4] *See* 18 C.F.R. § 2.70(b)(3) (1986) (codifying FERC Opinion 699-B, 39 Fed. Reg. 33206 (Sept. 16, 1974)).

While the 533 application was pending, Congress was formulating the Natural Gas Policy Act (NGPA). The NGPA began deregulation of natural gas prices.[5] The price disparity between interstate and intrastate gas began to be eliminated. Accordingly, 2.68 and 533 sales were no longer especially advantageous. In November, 1978, the NGPA became law.[6] FERC approved the 533 application at around the same time, but at a natural gas price that was not attractive to the Greens Creek producers. The producers then declined to contract with Consul for natural gas sales and arranged instead a favorable, long-term contract with Transco.

III. LITIGATION BELOW

Consul brought this action following the failure of its 533 sale. Generally, Consul alleges that Transco conspired and used its monopoly power over the pipeline to preclude Consul from arranging purchases from the Greens Creek and Holiday Creek fields in violation of §§ 1 and 2 of the Sherman Act.[7] With regard to the monopoly claim, Consul alleges that it lost commissions on the 2.68 sales in connection with Transco's refusal to facilitate those sales. Consul claims the loss of further commissions from the 533 sale on the basis of Transco's delay in filing the 533

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[5] For a summary of the regulatory system under the NGPA, see Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 Harv. L. Rev. 345, 348-51 (1983).

[6] *See* Pub. L. No. 95-621, 92 Stat. 3352 (codified at 15 U.S.C. §§ 3301-3432 (1982)).

[7] Sherman Act § 1, 15 U.S.C. § 1 (1982), is directed toward concerted activity: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal," with certain provisos concerning resale price maintenance.

Sherman Act § 2, 15 U.S.C. § 2 (1982), reaches single-firm efforts at monopolization as well as conspiracies: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

application and obstructionism on the part of Transco, which allegedly caused FERC to postpone action on the application until passage of the NGPA. That is, Consul asserts that if Transco had not delayed the 533 approval process, the 533 sale would have been consummated, resulting in commissions for Consul. Consul also sought injunctive relief. That equitable claim is the subject of a separate proceeding.

Before trial, Transco moved for partial summary judgment on, among other things, the 533 claim. Transco argued that Consul offered insufficient evidence that Transco caused any damage to Consul in connection with the 533 sale. The district court granted the partial summary judgment in favor of Transco on October 31, 1984.

At trial, the district court directed a verdict against Consul on its claim under § 1 of the Sherman Act, since there was no evidence of a conspiracy. Consul does not appeal that ruling.

As to the § 2 claim, the jury found that Consul was damaged in the amounts of $24,000 for the interruption of gas from the Holiday Creek 2.68 sale and $216,300 for the loss of sales from Greens Creek. After entry of judgment for treble those damages pursuant to § 4 of the Clayton Act,[8] Transco properly moved for judgment notwithstanding the verdict ("n.o.v."). The district court granted this motion in two respects: first, that there was no evidence that Holiday Creek was a relevant market, hence the $24,000 award could not stand, and second, that $62,100 of the damages awarded by the jury for the fourth 2.68 sale from Greens Creek had no basis in the record, and hence could not stand. The district court also denied Consul's motion to transfer the injunctive aspect of the case to the United States District Court for the Western District of North Carolina, Charlotte Division. Final judgment, after the damages were trebled, was entered for $462,600, on August 26, 1985.

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[8] 15 U.S.C. § 15 (1982).

IV. DISPOSITION ON APPEAL

Consul now appeals the partial summary judgment entered against it on the 533 claim and the judgment n.o.v. on the Holiday Creek and the fourth Greens Creek 2.68 sales, as well as the denial of transfer. Transco cross-appeals the adverse jury awards on the first three Greens Creek 2.68 sales. Jurisdiction is proper under 28 U.S.C. § 1291 (1982). We conclude that the district judge correctly found that Consul failed to establish Holiday Creek as a relevant market for Sherman Act § 2 purposes, and so affirm that part of the judgment n.o.v. We further conclude that the same failure is equally fatal to the entire case. Consul's claim may sound in tort, but it is insufficient to invoke the protection of the antitrust laws. Thus, we affirm the partial summary judgment on the 533 claim and the judgment n.o.v. as to the fourth Greens Creek claim. We reverse the district court's refusal to grant judgment n.o.v. on the first three Greens Creek claims. The denial of the motion to transfer is affirmed as within the district court's decision.

V. DISCUSSION

A. The Relevant Market Requirement

Proof of a relevant market is the threshold for a Sherman Act § 2 claim. The plaintiff must establish the geographic and product market that was monopolized. This proposition has been practically incontrovertible since *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). *See, e.g., American Hoist & Derrick Co.* v. *Sowa & Sons*, 725 F.2d 1350, 1366-67 (Fed. Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 95 (1984); *RCM Supply Co.* v. *Hunter Douglas, Inc.*, 686 F.2d 1074, 1076 (4th Cir. 1982); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 711-12 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1348 (3d

Cir. 1975); *E.J. Delaney Corp.* v. *Bonne Belle, Inc.*, 525 F.2d 296, 305 (10th Cir. 1975), *cert. denied,* 425 U.S. 907 (1976); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975); *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269, 286-87 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973).[9]

Consul, undaunted by the weight of this authority, claims to have found three theories on which § 2 liability can be rested without reference to a relevant market. In the alternative, Consul proffers the two natural gas fields, Holiday Creek and Greens Creek, as well as "all other sources of natural gas from which there is no presently economically feasible alternative means of transportation other than Defendants' pipeline"[10] as the geographical limits of a relevant market, and natural gas at the wellhead as the product in question. We are not convinced by either branch of the argument.

Consul strenuously urges that there is more than one type of § 2 claim; in fact, it argues, there are at least four types, of which three — "leveraging" cases, "essential facility" cases, and "market foreclosure" cases — are not concerned with market definition. We take no issue with the usefulness of Consul's typology or the aptness of these labels in describing forms of action under the Sherman Act. The fact remains that a relevant market must be proven under any of these theories. This is clear from a reading of the authorities cited by Consul. *See, e.g., Otter Tail Power Co.* v.

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[9] Cases to the contrary appear in the Ninth Circuit. *See Blanton* v. *Mobil Oil Corp.*, 721 F.2d 1207, 1213 (9th Cir. 1983) (plaintiff not required to prove a relevant market to show attempted monopolization under § 2 when defendant engaged in *per se* violations of § 1), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1874 (1985); *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 903 (1964) (decided prior to *Walker Process*). But as the *Blanton* court made clear, the Ninth Circuit waives the requirement of proving a relevant market only in cases involving attempted monopolization rather than actual monopolization and in which the plaintiff shows either predatory conduct or a *per se* violation of § 1. *Blanton*, 721 F.2d at 1214. We follow the rule established in this and most of our sister circuits, that proof of a relevant market is always required.

[10] Complaint at para. 30(c).

United States, 410 U.S. 366, 369 (1973) ("The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail.").[11]

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[11] Consul cites numerous other cases in its attempt to allay the problem of market definition. None is persuasive. Consul finds the beginnings of "essential facility" theory in *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912), which, as Consul notes, predates the recognition of market definition as the indispensable element in Sherman Act analysis in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1955). Nevertheless, *Terminal Railroad* evinces considerable concern for the particular effects of that defendant's actions on a particular market for rail transportation: St. Louis. *See* 224 U.S. at 392-407; *see generally* Troy, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 Colum. L. Rev. 441 (1983) (arguing that essential facility cases fit, at the threshold, within traditional § 2 analysis, including market definition). This is the type of concern not presented by Consul's evidence, which cannot and does not establish the degree to which Transco has market power over natural gas at the wellhead. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927), to which we are also referred, is wholly inapposite: in that case the question of monopolization had been settled in a prior and separate suit. *See id.* at 369.

As for "leverage" theory, Consul itself acknowledges the need to prove monopolization in one market before examining the "leveraging" of that monopoly power in the separate market. In the case of *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944), cited by Consul, the relevant geographical market was clearly established: seventy-odd small towns in the mid-east. Similarly, in *United States* v. *Griffith*, 334 U.S. 100 (1948), the monopolistic practices involved corporations in Oklahoma, Texas and New Mexico that owned the only movie theater in each of fifty-three towns.

Nor do the "market foreclosure" cases to which Consul refers us offer a way around the requirement of market definition. The Court in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953), struggled with the proper extent of the market for newspapers. *See id.* at 610 ("Once granted that the volume of commerce affected was not 'insignificant or insubstantial,' the Times-Picayune's market position becomes critical to the case.") (citation omitted). Likewise in *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), the Court examined the particular details of commerce in communication in and out of Lorain, Ohio, concluding that the Journal had "a substantial monopoly in its area." *Id.* at 154.

As Justice Frankfurter first noted,[12] and as this court recently reasserted, the relevant geographic market is the area in which buyers or sellers of the relevant product effectively compete. *See Satellite Television* v. *Continental Cablevision,* 714 F.2d 351, 357 (4th Cir. 1983). The formulation approved by this court in *RCM Supply* is helpful: "the geographic market should consist of *an area in which the defendants operate and which the plaintiff can reasonably turn to for supplies.*" 686 F.2d at 1077 (emphasis in original). *See Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327-34 (1961). The penultimate question, towards which this preliminary inquiry into market definition is directed, is whether the defendant has market power: the ability to raise prices above levels that would exist in a perfectly competitive market.[13] The geographic demarcation should not be too tightly drawn, unless clear evidence exists that potential competitors outside the region are hindered from entering. A market drawn too tightly, either in geographic terms that exclude potential suppliers or in product terms that exclude potential substitutes, creates the illusion of market power where none may exist. *See Jayco Systems v. Savin Business Machines Corp.,* 777 F.2d 306, 319-20 (5th Cir. 1985), *cert. denied,* ___ U.S. ___, 55 U.S.L.W. 3204 (October 7, 1986); *American Key Corp.* v. *Cole National Corp.,* 762 F.2d 1569, 1580-81 (11th Cir. 1985); *cf. American Football League v. National Football League,* 323 F.2d 124, 129-30 (4th Cir. 1963) (describing limits on market in terms of the defendant's activity, but viewing that activity broadly to include all locations where the defendant might choose to do business). Such a misleading start in antitrust analysis, always a difficult area for judicial resolution, *cf. Standard Oil Co. (California)* v. *United States,* 337 U.S. 293, 332 (1948) (Jackson, J., dissenting) (noting the difficulty raised by economic problems presented for judicial action in Clayton Act cases), makes accurate determina-

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[12] *See Standard Oil Co. (California)* v. *United States,* 337 U.S. 293, 299 n.5 (1949).

[13] *See, e.g.,* II P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* para. 517 (1978); R. Posner, *Economic Analysis of Law* 195-201 (2d ed. 1972).

tion of the ultimate question — whether the antitrust laws have been violated — impossible.

B. The Market Pleaded

In this case, Consul urges that the relevant product is natural gas at the wellhead. The relevant geographical area pleaded is a strange amalgam of two natural gas fields in Mississippi plus any other areas in which Transco controls access to natural gas by virtue of the pipeline, but does not own the gas and would not transport it if Consul was able to broker it.

There is no way to establish Transco's market power in the market for natural gas at the wellhead on the basis of the above geographical limitation and the evidence presented by the parties.[14] The evidence did indicate that the producers at Greens Creek had numerous opportunities to sell gas to a large number of buyers other than Transco; that Transco bought only a small percentage of the gas produced in the county in which both fields lie; that Transco purchased gas all along its line from Texas to New York; and that the producers at Greens Creek considered attachment to the intrastate pipeline network a viable option. There is no indication that Consul's efforts to find sources of gas elsewhere in the country were foreclosed by Transco's power in the market. There is no reason to believe that circumstances rendered the two fields around which the instant events occurred economically significant portions of the national market for natural gas. *Cf. Brown Shoe Co.* v. *United States*, 370 U.S. 294, 336-37 (1962) (regarding Clayton Act § 7). There is no way to measure Transco's market power in an area as ethereal as

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[14] The Fifth Circuit has held that a natural gas field constituted a relevant geographic market under § 2 of the Sherman Act. *See Woods Exploration & Production Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 414 U.S. 1047 (1972). Both parties in that case were owner/extractors of the gas field; their competition was tied to that field. In contrast, Transco can operate anywhere along the pipeline, and Consul is in the business of finding natural gas wherever it exists. Nothing inherent in the market, as Consul presented that market to us, links their competition to any one or two particular fields.

"sources of natural gas not owned by Transco but in close proximity to their pipeline and which would not be available to Consul as a broker under Transco's policies." While the market may not be measurable in "metes and bounds," *see Times-Picayune Publishing*, 345 U.S. at 611, it should be demonstrable in other than purely hypothetical terms. In sum, there is no reason to believe that the geographic market pleaded covered Transco's activities in a way that would encompass the area of effective competition between the parties, as brokers of natural gas.[15]

We conclude that the district court was correct in granting judgment n.o.v. on the fourth Greens Creek 2.68 contract and in granting summary judgment on the 533 contact.[16] We reverse the refusal to grant judgment n.o.v. on the other 2.68 contracts.

AFFIRMED IN PART AND REVERSED IN PART.

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[15] *Cf.* Pierce, *supra* note 5, at 381 (discussing Transco's power in the market for transportation of natural gas into North Carolina). This case in no way forecloses a showing that a natural monopolist has violated the Sherman Act in a way analogous to *Otter Tail*. The plaintiff here, by focusing on the localized production source in Mississippi, has not presented us with the facts about the relevant market necessary for such a showing.

[16] Consul raises several points on appeal in connection with the granting of summary judgment, which points are mooted by the failure to prove a relevant market. We therefore decline to discuss the adequacy of hearing afforded to Consul on its charge of regulatory obstruction, or the sufficiency of the evidence that Consul presented. All of the contested evidence, if admitted, would not establish an *antitrust* violation under Sherman Act § 2, absent a clearer showing of Transco's monopoly power in a relevant market.

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No. 86-1549

IN THE

Supreme Court of the United States

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CONSUL, LTD.,

Petitioner,

v.

TRANSCO ENERGY COMPANY, formerly known as TRANSCO COMPANIES, INC., and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

1. Transco's Use Of Its Strategic Dominance In Transportation To Exclude Competition In Other Lines Of Business Continues Regardless Of Vastly Changed Conditions In Markets For Natural Gas

Transco, in the second paragraph on page 2 of its brief in opposition, alleges a number of undocumented changes that have occurred in the natural gas industry since the events which gave rise to this suit took place in 1978. The facts are true insofar as they go,

but Transco omits other important facts which refute its assertion that the violation charged "does not address current conditions in the natural gas industry, nor can it have any broad interest." The fact is that Transco's use of its strategic dominance in transportation to exclude competition in the product market for gas continues to this day, to the continuing injury of plaintiff as alleged in its original complaint.

We have no wish to enlarge the record, but since Transco's argument is predicated on developments since the record was closed, we call attention to publicly available sources that provide factual information abut the period to which Transco refers, primarily the recent book by Arlon R. Tussing and Connie C. Barlow, *The Natural Gas Industry: Evolution, Structure and Economics* (1984) (hereafter "Tussing & Barlow").

Key facts which Transco omits from its recital include the following:

(1) The glut of excess gas that emerged in the 1980s did not result in depressing prices, as would be the normal expectation in conditions of glut. This was a glut of high priced gas, the result of Transco—and other interstate pipelines—buying more high priced gas than they were able to sell. At the same time, while regulation of prices at the wellhead was largely deregulated by the NGPA of 1978, regulation of transportation continued. (Tussing & Barlow, p. 218) Under that regulation, Transco is required to average the cost of all the gas in its system and sell at that average price. This resulted in an increasing price level that in many cases made gas no longer competitive with other fuels. (Tussing & Barlow, pp. 117, 171-78, 217-18)

(2) Other sources of natural gas, not locked into Transco's high average cost of gas, were available to meet the needs of industrial end users who could use this cheaper gas but not Transco's higher priced gas. (Tussing & Barlow, p. 217)

(3) The result has been a tiered pricing situation in which transportation has been sought for lower cost sources of gas needed by end users who cannot afford the higher priced gas offered by the pipelines; but who encounter resistance on the part of the pipelines to transport the competitive cheaper gas. This situation is not limited to Transco. The situation is described by Tussing & Barlow as follows:

> "The self-help program of the 1970s may have set in motion forces that ultimately will transform the gas and transmission business. For the first time since the interstate market arose, users and producers were directly in contact. Even after the shortages disappeared, the gas surplus of the 1980s rekindled self-help transactions. This time, industrial customers were shopping around for gas that would cost *less* (including transportation charges) than gas purchased from an interstate carrier." p. 217 (emphasis in original).

The same authors also make clear that Transco's refusal to transport is not unique:

> "Increasingly, interstate pipeline companies are having to reckon with a future that could strip them of a traditionally central and aggressive role in gas industry transactions. Some are fighting the winds of change by

> making it very difficult for third parties to utilize their facilities on a contract basis." *Ibid.*

It has been largely in response to this situation that FERC has been attempting to work out transportation arrangements on a voluntary basis under its Order 436, referred to both in the Petition and Transco's brief. But this program remains voluntary, with no prospect of its becoming manditory because FERC lacks the authority to make it so.

Two further points should be noted in response to Transco's contention that changed conditions make the issue presented by this case not relevant to present conditions. One is that the only historically unique circumstance that cannot be expected to recur is the change from a regulated to a deregulated wellhead price. The only impact that development had on this case, however, went to a question of damages which is not in issue on this petition.

The second point is that the major change that has occurred—from shortage to surplus—is not expected to be permanent. Both Transco's CEO, W.J. Jack Bowen, and plaintiff's expert witness describe the surplus as temporary and likely to be followed by a future period of shortage. (.J.R. pp. 2478-79; 1411). A recent article in the *Oil and Gas Journal* predicts an end to the surplus by 1988 (Nov. 24, 1986, p. 31).

2. The Fourth Circuit's Decision Is Not Distinguishable From The Fifth Circuit's Contrary Decision In *Woods v. Alcoa*

In both cases the alleged violation consisted of anticompetitive behavior related to a single natural gas producing field, and in each case the defendant sought

to escape liability on the ground that a single field of natural gas was too narrow to constitute a relevant market. In *Woods Exploration and Production Co. v. Aluminum Co. of America*, 438 F.2d 1286 (CA5 1971), *cert. denied*, 404 U.S. 1047 (1972) there was no special interrogatory to the jury as to the existence of a relevant market, as there was in the instant case. The trial judge in *Woods* entered a judgment n.o.v. against the plaintiff on the ground, as the Fourth Circuit ruled here, that the single natural gas field could not be a relevant market, and the Fifth Circuit reversed the ruling. The jury in this case specifically found that relevant markets had been proved with respect to two fields of natural gas. We submit that the Fourth Circuit's overriding of the jury verdict on the ground that these fields were part of a larger market cannot be reconciled with *Woods v. Alcoa*.

Transco protests our quotation from an earlier Fourth Circuit decision rejecting the concept of relevant sub-markets on the ground that it was a different case. *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (CA4 1983), *cert. denied*, 465 U.S. 1027 (1984) (hereafter "*STAR*"). But the Fourth Circuit cited that precedent in its opinion below (Pet. App. p. 12a, 805 F.2d at 495), and the logic of its ruling reflects the same rejection of the concept of a relevant sub-market that it expressed earlier in *STAR*.

3. The "National Market" For Natural Gas Proclaimed By FERC To Have Emerged In 1985 Did Not Exist In 1978, And Has No Assured Future

Although Transco injects a reference by FERC to a "national market" for natural gas in the context of changed conditions in the industry, and not in the

context of the relevant markets, the language so clearly parallels that of the Court of Appeals on that subject that the distinction should be emphasized. We stated in our petition that the "national market" for natural gas referred to by the Court of Appeals did not exist. This was in the context of the time frame included by the record of this case which was 1978-1979.

Since then, as a condition of shortage turned into glut it became practical to use techniques for the purchase and sale of gas between two points even though the gas owned by the seller cannot be physically transported to the location of the buyer. (50 Fed. Reg. 42,413 (Oct. 18, 1985) This is what is meant by the language quoted from FERC that "a given supply of the natural gas commodity can now be transported—by front haul, back haul, exchange or displacement—to points throughout the continental United States." (Transco brief p. 5). Under the shortage conditions of 1978 this was not a significant possibility because there were no excess supplies that could be utilized to make such techniques workable as a means of alleviating the shortage.

Moreover, the extent to which such transactions that transcend the limits of a given pipeline system are likely to continue is highly problematical. Tussing and Barlow, *supra*, note that:

> "Wherever possible they [interstate pipelines] tried to sell gas *off system* to other pipelines that had not yet encountered the limits of customer demand. But by the time regulatory obstacles to off-system sales were overcome, the gas glut had infected the entire nation, and there were no re-

gional shortfalls left to fill." p. 173 (emphasis in original).

The FERC statement about a "national market" therefore has no bearing in support of the Fourth Circuit's reliance on that concept to reject the jury's findings as to relevant markets. The concept appears nowhere in the record of the trial and appeal, Transco's argument having been that the gas producers had alternatives to selling their gas to Transco. But the jury also heard evidence that any such alternatives would have required the construction of a new pipeline and that no plans were in place to do so. (J.R. pp. 1926-30)

With respect to the context in which Transco uses the FERC quotation, as an illustration of changed conditions in the industry, it should be pointed out that this national market can work only if transportation is available, and, as indicated above, availability of transportation remains a problem. FERC noted in its 1985 comments quoted from in Transco's brief that "There are some geographic areas where there is but a single pipeline supplier" (50 Fed.Reg. 42,412 Oct. 18, 1985), and further that the availability of supplies on a national basis is contingent upon "non-discriminatory access to the transportation service and proper rate treatment for all pipelines" (*Id.* at 42,413). The fact that transportation is a continuing problem on a national scale is a matter of public record in the ongoing FERC proceedings regarding Order 436.

CONCLUSION

What is at issue in this case is not an idiosyncratic set of facts that are now history, but the ongoing behavior of Transco systematically to employ monop-

olistic practices to exclude competition in product markets for natural gas. Moreover, for Transco to escape responsibility for its singularly outrageous conduct in the shortage conditions of 1978 would send a message not only to Transco but to all interstate pipeline systems that they need not concern themselves about the antitrust laws should they choose to manipulate the vast power of their pipelines to exclude unwelcome competition.

Respectfully submitted,

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